VIRGINIA LAW REGISTER

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Issued Monthly at $5 per Annum. Single Numbers, 50 cents.

All Communications should be addressed to the PUBLISHERS.

Virginia vs. West Virginia.

We publish in this number the opinion of the Supreme Court of the United States delivered by Mr. Justice Holmes in this case, which is of absorbing interest in more ways than one. The case is unusual, for never before in the history of the great tribunal before which it was argued, has a similar one been heard. It is a suit between two sovereign States, one of which was reft from the other by methods not "questionable" but absolutely unquestioned in the minds of fair and well-thinking men as to their illegality. Amidst the noise of civil strife the law was indeed silent and by a legal fiction subsequently made a fact by the courts, the Commonwealth of Virginia was severed in twain. By the instrument which created or compelled the separation, the new "State" agreed to assume its fair proportion of the old State's debt, but contented itself with that statement and did nothing until it was brought to bar. At last the highest tribunal in the land has adjusted the old Commonwealth's right to have the new State pay its just proportion of that debt, which has been fixed at within one per cent of what was claimed by counsel for Virginia, estimated upon the basis of the taxable values of the two states in 1863, though this basis of apportionment gave Virginia less than her counsel have claimed was properly due her.

The opinion of the Court is, to say the least of it, disappointing and seems to lack the vigor and directness characterizing for the most part the decisions of the Supreme Court. In some respects the Court appears almost to assume the position of a Board of Arbitration, rather than as exercising the clear, distinct and solemn duty charged upon it by the Constitution. It avoids the question of interest, treating it as a question of doubt, and leaving it to future determination or to the patriotism and fraternity of the states. Certainly if anything was due it should

carry interest, especially as the debt of the original state, of which it formed a part, bore interest. But the Court likens it to a private case and speaks of the question of laches. We thought that if any one question was well settled it was that laches could not be interposed as a defence against a state, and the Supreme Court has itself so decided in more than one case. Metropolitan R. R. *v.* District of Columbia, 132 U. S. 11, where the Court, speaking through Mr. Justice Bradley, said: "No restrictive laws apply to the sovereign unless so expressed. And especially no laws affecting a right on the ground of neglect or laches, because neglect or laches cannot be imputed to him. And it matters not whether the sovereign be an individual monarch or a republic or a state." The same doctrine is laid down in Armstrong *v.* Morrill, 14 Wall. 144, 145; Weber *v.* Commissioners, 18 Wall. 70; Gibson *v.* Chouteau, 13 Wall. 99, and was, we thought, practically placed beyond question as far back as Lindsay *v.* Miller, 6 Peters 673, and U. S. *v.* Knight, 14 Peters 315.

Presumptions.

We trust we may not be considered "presumptuous" when we beg leave to say that our Supreme Court of Appeals in the case of Southern Railway Company *v.* Wyley, etc., decided March 11th, 1911, has laid down a rather remarkable rule of law as to a presumption in that case.

A child was killed upon the track of the Company at a certain point which had long been used as a pass-way by persons in the vicinity with the knowledge and acquiescence of the company. The question was whether the engineer might not have avoided the accident by use of care, and the case was, very rightly, we think, decided that the company was liable—the engineer looking in the direction of the child and not being engaged in the performance of any other duty, whilst the train was moving so slowly it could have been stopped in ten feet. A witness also testifying that he plainly saw the child on the track, although he was a hundred feet farther off than the engineer.

Our Court, however, says: "There is no suggestion that the eyesight of the engineer was not as good as that of the average

man; the *presumption indeed is that it was better than the average,* for engineers are inspected and tested with respect to their vision." Not having seen the record we do not know whether this last statement as to the testing and inspection of the eyesight of engineers was a matter of evidence in the case. If it was, then was the Court correct in making it a presumption that the eyesight of the engineer is better than the average? If it was not a matter of evidence, then upon what theory could the Court lay it down as a "presumption"?

Now a presumption is a deduction which the law expressly directs to be made from particular facts, or a consequence which the law or judge draws from a known fact to a fact unknown. The mere fact that engineers' eyesight was tested and inspected could not in the nature of things, it seems to us, make it a presumption *of fact* that necessarily their eyesight is better than that of the average man. Even were the fact of such testing and inspection proven as to a class, the law could not draw an inference as to an individual unless the fact of such inspection and testing was shown as to that individual. The mere fact that a man is a railroad engineer and that railroad engineers are examined as to their eyesight ought not to establish it as a presumption of fact that every engineer has better eyesight than the average man. Would not that be to draw an inference as to that particular man from a presumption as to a class? And the language of our Court in C. & O. Ry. Co. *v.* Heath, 103 Va. 64, seems to bear us out in this: "An inference cannot be drawn from a presumption, but must be founded upon some fact legally established."

So we respectfully submit that the language of the Court in this matter went a little further than it should have done.

And whilst talking of presumptions probably one laid down by the Supreme Court of the United States in Baltimore, etc., R. Co. *v.* Landrigan, 191 U. S. 461, has escaped the notice to which it is entitled. The Court in that case laid it down that a man killed at a railroad crossing is presumed to have stopped, looked and listened, and that this presumption is founded on a law of nature. C. & O. Ry. Co. *v.* McVey, 46 W. Va. 111, holds practically the same view as the Supreme Court, but stated it in a little different way.

Municipal Duties.

The Minnesota Supreme Court has lately held a municipality liable for a death from typhoid fever due to the use of polluted water supplied by it through the public mains. We can see no reason why this decision is not sound law if the proof sustained the allegation as to the cause of the death. A city conducting a water works system for the general purpose of supplying its inhabitants with water for pay is not acting in any governmental capacity and is of course liable for any act of negligence in connection with such a system. The difficulty, it seems to us, is not one of legal liability as much as of proof. A sporadic case of typhoid may be brought from afar and yet analysis of the city water show the existence of typhoid germs therein. The doctors tell us one man may drink typhoid germs and yet his system may be in such a condition as not to become liable to the fever, whilst another may become infected by the slightest contact. But we forbear to dwell upon the possibilities which cases following the Minnesota case may cause to arise. Expert witnesses will throng the courts and technicalities and *causæ remotæ* will fill the air.

Whom to Sue.

Whilst Minnesota has settled that a municipality can be sued, as we have mentioned, the Appellate Division of the Supreme Court of New York has rendered a decision in the remarkable case of Freibaum *v.* Brady for injuries inflicted by a motor car in which Brady was riding. The car in question was owned by Brady's brother, Brady himself owning another car, and he and his brother used the cars interchangeably. Neither had a chauffeur, but hired one by the hour from the New York Transportation Company. But as luck had it Brady's brother had paid the chauffeur for the time in which Brady was using the car.

The Court held that to sustain the suit it must not only be shown that the plaintiff was free from negligence, but that the driver of the car was about his employer's business; that Brady was only a passenger in his brother's car and that as his brother was not using the car or chauffeur upon his own business no action would lie against either. Equally the New York Transportation Company could not be held liable, as its chauffeur

was executing duties for another. Freibaum's only remedy was against the chauffeur. Here's a "mixtry" indeed and whilst we are inclined to think there's something wrong somewhere, we can not exactly put our finger on it. Can any one of our readers help us?

Freak Legislation.

The Missouri House of Delegates last month passed, by a vote of eighty-two to seventeen, a bill prohibiting treating—"the practice of treating in saloons or dram-shops, etc.," being declared a misdemeanor and punishable with a fine of not less than ten nor more than twenty-five dollars.

In the Indiana Legislature a bill has been proposed licensing all drinkers and requiring any person who desires to bibulate wine, malt liquors, ardent spirits, or any mixture thereof, to produce an official certificate from the proper authorities showing that he or she does not drink to excess, that his or her expenditures in the way of drink are not incommensurate with his or her resources, and that indulgence in the said wine, etc., etc., will not in any way injure himself, herself, family or business. We have no question that both of these laws would be upheld under the "police power" clause of our (unwritten) constitution, and we are anxious to see them both put to the test. They are just about as sane as some legislation on kindred subjects. But we shudder at the horrible possibilities of the Chicago Hat Pin ordinance, which limits—or shall we say "delimits"—the length of ladies' hat pins; and the fate of that eastern legislator who proposes to prohibit hobble and harem skirts is still to be determined, we trust by a jury of Washington State women.

Strange Judicial Procedure.

Judges are only "mortals," as a young lady once said of theological students, but when their "mortality" takes the shape of bad temper and recrimination *spread upon the records of their courts* all well-thinking people must deeply deplore their loss of dignity.

A United States Judge in Alabama last month placed on the

records of the Federal Court a document in which former Gov. B. B. Comer is described as a "bawler," an "ignoramus," an "advocate of lawlessness," and the "inciter of an attempt to take Alabama out of the Union."

The document is the answer of the judge to an attack made upon him by Governor Comer in the latter's farewell message to the Legislature in January. Governor Comer charged the Judge with usurping jurisdiction in the famous Alabama rate cases, and criticized the Court in terms of extreme severity.

The Judge denounces Comer's policy and charges him with attempting to rule by intimidation. He describes Comer's farewell address as, in the last analysis, "a desperate effort of the author, after years of vain bawling on the stump, to destroy the character of a Judge." In his retort to Comer the Judge also shows bitter resentment of the latter's references to his former corporation affiliations, while admitting that he represented railroads before he was appointed to the Federal bench.

We would hardly know how to believe this if it had not been reported in absolutely reliable newspapers and so far undenied. In what shape the Judge placed this fulmination upon the records of his Court has not been reported. He may have done so in his charge to the Grand Jury—which in former days was a vehicle for much eloquence and brilliancy—or he may have directed the Clerk to spread it as an opinion in a "moonshine" case—a case of "lunacy" is not suggested, although we believe the old Latins held anger and lunacy to be very close together—but be that as it may, if the reports be true, it is a sad reflection upon the Judge himself and speaks very poorly for his appreciation of the high office to which he has been called. It is one of the burdens of the judicial office to have to be silent under criticism—a hard burden often, but one incident to the office. Men may speak harshly, cruelly, unjustly of his decisions after they are rendered, and the Judge can not reply. The dignity of his office, the consciousness of the rectitude of his intentions, the finality of his decisions, the power of his position, the knowledge that he has the approval of his own conscience and the whole power of the State behind him, these things are his armor against which the "slings and arrows" of slander and vitupera-

tion fall and are forgotten. But when he lays down his ermine and through the vehicle of his own Court enters the lists with "bawlers" and scandal mongers and deals with them in their own way, it becomes a sorry spectacle and one to be alike pitied and deplored. We sincerely hope this newspaper account is untrue.